88-329

No. _____

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STEPHEN J. BODNAR,
J. E. BLANKENSHIP AND B. E. WELCH,

Petitioners,

v.

SYNPOL, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

H. P. WRIGHT
Counsel of Record
MARCUS A. PITRE
WRIGHT & PITRE
P.O. Box 186
Port Neches, TX 77651
(409) 722-0486

Counsel for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

4/0

QUESTION PRESENTED

Whether older employees (over 55) who told their employer that they did not want to take early retirement, but who did accept early retirement only after being forced to make a decision within fifteen (15) days and were threatened by being told individually and confidentially that they were in danger of losing their jobs with loss of employee benefits such as severance pay and health insurance were entitled to a jury issue on constructive discharge?

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NO. _____

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNTIED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The Memorandum Opinion of the trial court is reported at 633 F.Supp 13. See

Appendix A. The opinion of the Court of Appeals below is reported at 843 F.2d 190 (5th Cir. 1988). See Appendix B. The Order Denying Rehearing by the Court of Appeals below is Appendix C.

JURISDICTION

Petitioners filed an age discrimination suit based on 29 U.S.C. § 626(b) against their employer in the U. S. District Court for the Eastern District of Texas, Beaumont Division. The decision of the Court of Appeals was entered on April 26, 1988. On May 26, 1988, a timely Petition for Rehearing was denied. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves Age Discrimination in Employment Act of 1967. (ADEA) The purpose of the ADEA is "to promote employment of older persons based on

their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). At the time material to this suit, the statute protected "individuals who are at least 40 years of age but less than 70 years of age." 29 U.S.C. § 631(a). Under section 623(a) of the ADEA, "It shall be unlawful for an employer - (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." Section 623(f)(2) provides that it is not unlawful for an employer

> to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a

> retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such senority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual.

It also involves the requirements for a Summary Judgment under Rule 56(c) of the Federal Rules of Civil Procedure, as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

This is an age discrimination suit that was brought as the result of Petitioners' claim that they were forced to accept early retirement from their

place of employment. A summary judgment was rendered against the Petitioners. The trial court ruled that Petitioners did not introduce any evidence that the employer unduly influenced or defrauded the Petitioners of their rights. The circumstances surrounding the early retirement of the Petitioners are these. Out of approximately 160 non-union employees, Petitioners, along with 25 other employees, were hand-picked as being non-essential and were offered an early retirement package. The 28 selected were all over 55 years of age. None of the Petitioners wanted to retire and so advised their employer.

The employer had issued a bulletin announcing that it intended to reduce salary costs 10-15% through:

1) Normal Retirement;

2) A Special Early Retirement

Incentive Program; and/or

3) Reorganization to eliminate some jobs.

The early retirement program was not published, nor was it offered on a company-wide basis. Each employee selected for the program was contacted by supervisory personel on an individual and confidential basis.

No information concerning the number of people offered or accepting the program was given to the selected employees. Each Petitioner sought information that would allow him to understand whether or not it would be necessary for him to retire in order for the employer to reach its salary reduction goal. The employer refused to give the Petitioners this information. Each Petitioner was advised that there would be a lot less people left after the salary reduction

plan was over. They were further advised that, if their job was terminated, then there would be loss of job benefits (i.e., severance pay, health insurance, etc.). The Petitioners were only given 15 days to make up their minds. Petitioner Bodnar asked for additional time to decide, but was denied. Petitioners made known that they could not afford to and did not want to retire, but each later capitulated and accepted the plan, in the face of the no-win situation they were confronted with. Petitioners maintain that there is ample evidence that their retirement was involuntary.

This employer remained in business and kept its work force, union and non-union, at approximately 500 people. The employer replaced at least one of the Petitioners with a younger employee (i.e., one under 40). The pronouncement

by the supervisory personel presenting the early retirement plan to the Petitioners that, " there are going to be a lot less people around here after this is over," was a misrepresentation, tantamount to fraud.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED BECAUSE THE LOWER COURT'S ENTRY OF A SUMMARY JUDGMENT AGAINST THE PETITIONERS DEPRIVED THEM OF A JURY TRIAL WHEN THERE WERE MATERIAL ISSUES OF FACT TO BE DECIDED. CERTIORARI SHOULD ALSO BE GRANTED BECAUSE THERE IS APPARENT CONFLICT AMONG THE CIRCUITS ON AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT (i.e., THE STANDARDS TO BE APPLIED IN DECIDING AGE DISCRIMINATION CASES WHERE EARLY RETIREMENT PLANS ARE INVOLVED)

The ADEA clearly provides that no employer shall permit an employee to involuntarily retire. It is national policy to guard against involuntary retirement. Subterfuge is prohibited under the Act.

Retirement is not voluntary just because it is denominated as such.

In this case the employer set out to get the Petitioners to retire. This was the employer's goal. If it was the employee's goal to retire at an early age and there was a good faith meeting of the minds, there would be no vice. The problem arises when the employee feels compelled to act and does so not by free choice but because of the compulsion.

There is no question but that the parties were not at equal bargaining positions in this case.

The employer was in a superior bargaining position because it knew when

it had reached its desired salary reduction level. It could have imparted this knowledge to its employees, but would not and did not.

It did nothing to aid the employee in making a decision other than to inject the terror of losing employee benefits. On top of this terror, the employer put a 14-day time limit on the decision and refused to extend the time.

Such pressures clearly demonstrate that there was overreaching and exploitation of a protected class of employees.

The Court of Appeals, while ruling against Petitioner, cited with approval its decision in Downey v. Southern Natural Gas Co., 649 F.2d 302, 305 (5th Cir.1981), which held that the test for constructive discharge is whether a person in the employee's position would have felt compelled to resign under the

circumstances. Petitioners submit that what a reasonable person would have done under the same or similar circumstances is a normative issue and has always been, and will always be, a fact issue, not susceptible to summary judgment.

The Court of Appeals attempted to distinguish Downey by the fact that it involved a claimed unique discriminatory act against one employee, rather than a plan offered to numerous employees. 843 F.2d at 193, Appendix B, at 18a. Petitioners would point out that, even though it turned out that the plan was presented to numerous employees, that fact was purposely withheld from each of them. They were denied this information, even though they asked for it. As far as each of them knew, he was the only one being offered the plan. The rest of Petitioners' co-workers were not subjected to

the stress and circumstances threatening their job security that each of them were, contrary to the holding of the Court of Appeals below. Petitioners were essentially in the same position as the employee in Downey, as far as their mental states were concerned.

There is an apparent conflict among the circuits as to the "benefits" flowing to early retirees. The Fifth Circuit, at 843 F.2d 192, Appendix B, at 16a, favors the bent of the Seventh Circuit in Henn v. National Geographic Society, 819 F.2d 824, 826 (7th Cir. 1987), where Judge Easterbrook explained:

> "Provided the employee may decline the [early retirement] offer and keep working under lawful conditions, the offer makes him better off. He has an additional option, one that may be ... worth a great deal of money. He may retire, receive the value of the package, and either take a new job (increasing his income) or enjoy new leisure. He also may elect to keep working and forfeit the package. This

> may put him to a hard choice; he may think the offer too good to refuse; but it is not Don Corleone "make him an offer he can't refuse." "Your money or your life?" calls for a choice, but each option makes the recipient of the offer worse off. When one option makes the recipient better off, and the other is the status quo, then the offer is beneficial. That the benefits may overwhelm the recipient and dictate the choice can not be dispositive."

The Second Circuit apparently does not share the same feelings as the Fifth and Seventh Circuit, as Judge Feinberg wrote:

> "We note at the outset that accepting early retirement is a major decision with far-reaching impact on the lives of older workers and we emphasize that the decision must be voluntarily made. We believe that it is relevant to the determination of voluntariness whether the employees received sufficient time to make a decision. Because of the magnitude of the decision to accept early retirement, employees must be given a reasonable amount of time to reflect and to weigh their options in order to make a considered choice. The amount of time reasonably required, though, will vary depending on the circumstances of each case."

Paolillo v. Dresser Industries, 821 F.2d 81, 84 (2nd Cir.1987).

In Paolillo, the Second Circuit, in a case very similar to the case at bar, reversed a summary judgment rendered in favor of the employer and declared 6 days too short a period of time in which employees should be required to act on such a major decision as accepting what the employer called "voluntary early retirement". In the instant case, the Fifth Circuit ruled that 15 days, while not generous, was sufficient, citing the benefits of early retirement. 843 F.2d 193-194, Appendix B at 22a.

Certiorari should be granted to resolve these conflicts and this important question of federal law, which has not been settled, to the writer's knowledge, should be settled by this Court. This Court should put to rest the question of what amount of time an employee protected by the ADEA should have to determine his

or her fate. This is a question of general importance to the employers and employees of America. This Court should also set the standards which employers should follow in presenting early retirement to their employees and, further, it should strike down overreaching by employers that permits involuntary retirement under the subterfuge of "voluntary early retirement", such as happened in this case.

For the foregoing reasons, a Writ of Certiorari should be granted.

Respectfully submitted,

H. P. WRIGHT
MARCUS A. PITRE

WRIGHT & PITRE
P. O. Box 186
Port Neches, TX 77651
Phone: A/C 409 722-0486

COUNSEL FOR PETITIONERS
STEPHEN J. BODNAR, ET AL

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

STEPHEN J. BODNAR, T. E. BLANKENSHIP, B. E. WELCH and WILLIS T. CHAMPION,	§	
Plaintiffs	§	CIVIL ACTION B-84-424-CA
VS.	§	CONSOLIDATED WITH CIVIL ACTION B-84-931-CA
SYNPOL, INC.,	§	
Defendant	§	

MEMORANDUM OPINION

The defendant moved for partial summary judgment which, if granted, would dispose of the entire case excepting a claim by plaintiff Bodnar. The other claims made by the plaintiffs are in essence constructive discharge or forced retirement claims.

The court for purposes of this opinion assumes that plaintiff Bodnar's claim for

constructive discharge is properly before the court, although the defendant in its brief and at oral hearing argued that this was not the case. However, because this court finds that none of the plaintiffs in this cause can bring a cause of action based on constructive discharge or forced retirement as a matter of law, the court does not decide whether plaintiff Bodnar's claim is properly before the court.

FACTS

Synpol, Inc., is a subsidiary of Uniroyal, Inc. In 1983, Synpol faced deteriorating business conditions, and accordingly, Synpol's management began attempting to reduce costs. A three-fold plan was devised to reduce the corporation's expenses. One part of this plan, the focus of this litigation, was the Special Early Retirement Incentive

Program (SERIP).

The SERIP Plan.

Under the SERIP plan, certain non-union, salaried employees who were eligible for early retirement under the company's pension plan; i.e., had reached age 55 and had ten years' service; were to be offered an additional finanacial incentive to voluntarily elect early retirement. The retirement date was to be effective no later than November 1, 1983. The only eligible employees not offered SERIP were those deemed essential to the operation. A total of twenty-eight (28) persons were offered SERIP on September 27 and 28, 1983. These employees were given approximately 14 days to accept or reject the offer.

The amount of the incentive varied somewhat depending on years of service and annual base salary. The formula was

as follows:

(a) A fixed sum in the amount of $10,000; plus

(b) A variable sum equal to the number of years of service times 1% of annual base salary.

The incentive was to be paid in one lump sum.

The plan was discussed individually with each of the twenty-eight (28) employees to whom it was offered. It is not known whether any one of the 28 employees knew which other employees were offered the plan were. Each employee was advised of the exact amount of the incentive payment in his or her case. The company representative advised that there was an economic need to cut back operating costs, and that salary costs had to be reduced. It was explained that if an insufficient number of employees

elected SERIP, other means of salary cost reduction would be considered; i.e., employee termination. Although no decision had been made determining which employees would be terminated if a reduction became necessary, the employees were told that their jobs could not be guaranteed. It was emphasized that their job performance had not been considered in selecting them for the SERIP offer. It was further emphasized that the decision to accept or reject SERIP was solely their choice.

During the following weeks, twenty-one (21) of the 28 employees accepted the offer. Each of these 21 employees, including plaintiffs, signed a SERIP. This SERIP agreement expressly provides:

SPECIAL EARLY RETIREMENT INCENTIVE PROGRAM AGREEMENT

This Agreement is entered into this _____ day of _____, 1983, between

SYNPOL, INC., the "Employer" and _____, the "Employee." The Employer and Employee mutually desire to enter into this Agreement whereby the Employee voluntarily elects early retirement under the Employer's retirement plan in consideration of an additional sum of money, specified in paragraph 2, below.

1. The employee's retirement will become effective on _____, 1983. The employee will thereafter receive his or her monthly retirement allowance as provided in the Pension Program for Non-Union Employees.

2. In addition to the monthly retirement allowance described in paragraph 1, above, the Employee will receive $_____ in one lump sum payment.

3. The employee releases and discharges SYNPOL, INC., its officers, agents and successors from any and all claims arising under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq., The Age Discrimination in Employment Act, 29 U.S.C. 621 et seq.

4. The employee has read this Agreement, understands its terms and the release in it and voluntarily accepts its provisions.

_____ _____

For the Employer Employee

Date: _____, 1983.

As a result of the 21 acceptances, a further reduction in force proved unnecessary. The seven (7) employees who declined early retirement under SERIP are still employed with the company. All of the plaintiffs executed a SERIP agreement.

VALIDITY OF THE RELEASES

This court finds controlling Rogers v. General Electric Co., Slip Opinion No. 84-2692, filed Janaury 28, 1986 (5th Cir.). In Rogers, the Fifth Circuit upheld the granting of summary judgment based on a release of Title VII claims, that occurred on or before the date the release was executed. Although the release in Rogers released only Title VII claims, it is clear that the standards set forth in Rogers are equally applicable for determining the validity of any release which discharges the employer's liability from claims of employment

discrimination, be they claims of race, gender or age discrimination.

As in Rogers, the summary judgment proof establishes that the plaintiffs knowingly and voluntarily executed the release. At least one plaintiff, T. E. Blankenship, stated on deposition that the SERIP agreement was "a document signing any rights I might have away". Additionally, plaintiff Bodnar's agreement was modified at his request to exclude the discrimination charge. This modification evidences the voluntary nature of the releases.

Also, like the Rogers release, the agreement is clear and unambiguously worded and uses the term "Release" in its text.

The plaintiffs were also given ample time to seek legal advise, or to otherwise consider the SERIP plan. Plaintiffs

have not introduced any evidence that the defendant unduly influenced or defrauded the plaintiffs of their rights.

It is thereofre the opinion of this court that the partial summary judgment be granted in favor of the defendants.

DATED this 26 day of February, 1986.

/s/ Howell Cobb
UNITED STATES
DISTRICT JUDGE

APPENDIX B

Stephen J. BODNAR,
Plaintiff-Appellant,

v.

SYNPOL, INC.,
Defendant-Appellee.

J. E. BLANKENSHIP
and B. E. Welch,
Plaintiffs-Appellants,

v.

SYNPOL, INC.,
Defendant-Appellee.

No. 86-2966.

United States Court of Appeals,
Fifth Circuit.

April 26, 1988.

Appeal from the United States District Court for the Eastern District of Texas.

Before GARWOOD and JONES, Circuit Judges, and HITTNER*, District Judge.

EDITH H. JONES, Circuit Judge:

The district court granted summary

* District Judge of the Southern District of Texas, sitting by designation.

judgment against the three appellants, former employees of Synpol, Inc., who assert that their employer constructively discharged them in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 626(b) (ADEA). 633 F.Supp. 13. We affirm the summary judgment because the early retirement program as instituted and executed by Synpol did not constructively discharge them.

BACKGROUND

We recite as background the uncontested facts gleaned from the summary judgment evidence before the trial court. Synpol, Inc., formerly a subsidiary of Uniroyal, Inc., produces synthetic polymers in a plat in Port Neches, Texas. In 1983, Synpol's market for a synthetic polymer used in new car tires began to deteriorate drastically, prompting the company to embark on a dramatic cost

reduction program. This program was announced to all employees in an information bulletin issued September 28, 1983. The information bulletin announced that the company intended to reduce capital spending, reduce costs due to absences, and reduce salary costs ten percent to fifteen percent through normal retirement, a Special Early Retirement Incentive Program and reorganization to eliminate some jobs.

The Special Early Retirement Incentive Program (SERIP) was formulated to include salaried employees who were eligible for early retirement under the company's pension plan, having reached age 55 with ten years of company service. Certain eligible employees deemed essential to the company were not asked to participate in the SERIP. The SERIP necessarily excluded employees covered by collective

bargaining agreements. At that time, out of a total work force of approximately 450 employees, there were about 160 managerial employees.

Twenty-eight employees were offered early retirement under the SERIP on September 27 and 28, 1983. Their retirement date would be effective no later than November 1st. They were given 15 days to accept or reject the offer. A variable bonus of up to $20,000 cash was the incentive for early retirement. The plan was discussed individually with each of the employees to whom it was offered. Eventually, 21 of the offerrees accepted the SERIP agreement, which included a release of claims against Synpol. The seven employees who declined early retirement under the SERIP are still employed by the company.

Appellants' evidence focuses on

certain facts that are claimed to raise a jury issue concerning constructive discharge. First, they assert that the eligible employees were told that if they did not participate in the SERIP and their job was eliminated, they would not receive any severance pay or benefits. The employees did not "volunteer" to participate in early retirement but were "chosen" by the employer. They were told there would be a reduction in the work force. They were not given information concerning who, or how many, employees had been offered or had accepted the retirement plan. They were instructed not to discuss the SERIP offer with anyone else. Requests for additional time to consider the plan beyond the 15-day period were denied. Presentations concerning early retirement under the SERIP were made to the employees in an

allegedly "threatening" manner.

DISCUSSION

[1,2] Appellants assert that they were constructively discharged from their jobs by Synpol.[1] The test for this charge is whether a reasonable person in the employees' position would have felt compelled to resign under the circumstances. Downey v. Southern Natural Gas Co., 649 F.2d 302, 305 (5th Cir.1981). Because this is an appeal from a summary judgment, we review the evidence in the light most favorable to the nonmovants for the purpose of determining whether any genuine issue of material fact exists that requires a trial. Fed. Rule Civ.

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[1]The district court ruled against appellants on the basis that they had voluntarily released their rights against the company under Title VII or the ADEA. We need not review this ruling because we hold that whether or not the releases were voluntary, the appellants' constructive discharge claims fail.

Proc. 56(c); Powers v. Nassau Development Corp., 753 F.2d 457, 462-3 (5th Cir.1985).

[3] In general, an employer's adoption of an early retirement plan does not create a prima facie case of age discrimination under the ADEA.[2] Henn v. National Geographic Society, 819 F.2d 824 (7th Cir.1987); Gray v. New England Telephone and Telegraph Company, 792 F.2d 251, 255 (1st Cir.1986); Ackerman v. Diamond Shamrock Corp., 670 F.2d 66 (6th Cir.1982). We need not recite the manifold reasons that justify such plans and render them, in many situations, the fairest alternative available to a company. But, from the employee's perspective, as Judge Easterbrook explained in Henn:

> Provided the employee may decline the [early retirement] offer and keep

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[2] 29 C.F.R. § 1625.9(f).

working under lawful conditions, the offer makes him better off. He has an additional option, one that may be ... worth a great deal of money. He may retire, receive the value of the package, and either take a new job (increasing his income) or enjoy new leisure. He also may elect to keep working and forfeit the package. This may put him to a hard choice; he may think the offer too good to refuse; but it is not Don Corleone "make him an offer he can't refuse." "Your money or your life?" calls for a choice, but each option makes the recipient of the offer worse off. When one option makes the recipient better off, and the other is the status quo, then the offer is beneficial. That the benefits may overwhelm the recipient and dictate the choice can

not be dispositive."

819 F.2d at 826.

[4,5] The picture becomes more complicated, however, when the offer of early retirement irrevocably changes the employee's status quo. In Downey, for example, the employee was apparently singled out, told his company had nothing for him to do and the he was in danger of being discharged and losing retirement benefits. We held that the threat of being discharged with a loss of benefits created a sufficient contested issue of material fact to make summary judgment on the employee's age discrimination claim improper. 649 F.2d 302, 305. Downey is not entirely apposite here, because it involved a claimed unique discriminatory act rather than a plan offered to numerous employees. Downey does, however, set an outer bound on permissible employer

activity. An employer's "offer" of early retirement may create a prima facie case of age discrimination by constructive discharge if it sufficiently alters the status quo that each choice facing the employee makes him worse off. Of course, no individual employee or employee group may claim constructive discharge where all employees are subject to the same working conditions. See Vaughn v. Pool Offshore Co., 683 F.2d 922, 926 (5th Cir.1982).

[6,7] Judged by the foregoing standards, there are two complicating features in Synpol's SERIP plan. First, it was not offered to all employees at or near retirement age but only to non-essential, non-collective bargaining unit employees. Unlike the appellants, we do not find this feature consistent with a Downey-like possibility that they were

discriminatorily "singled out." Synpol, bound by the terms of its collective bargaining agreement, would be unable unilaterally to alter the working conditions for employees covered by a union. Further, although Appellants allege that they were "singled out," their summary judgment evidence does not refute or undermine in any way Synpol's failure to extend SERIP to otherwise eligible non-essential managerial employees. Surely an employer faced with the need to cut its workforce in order to survive (a claim Appellants nowhere contradict) may not be required to cut off its ability to survive as well in order to escape ADEA liability for an early retirement bonus program. If there were no objective criteria for determining the employees excepted from the SERIP, an inference of age discrimination might arise. But

there is no evidence to create such an inference here. An employer may implement an early retirement plan that does not extend to all potentially eligible employees if objective factors explain the exclusions.

[8] Appellants' second significant area of objection to SERIP is that they were not really offered a "voluntary" opportunity for an early retirement bonus. Coercion allegedly inhered in (1) the short time afforded appellants for considering their options, (2) the supervisors' "threat" that if not enough employees accepted early retirement and the offeree's job was eliminated he would not receive any severance pay or non-pension benefits and (3) the tone and manner of those who explained the plan. None of these factors, taken singly or cumulatively, constitutes objective

evidence that working conditions had become so intolerable as to force appellants' resignation.[3] The fifteen-day time period, although not generous, is a far cry from the twenty-four hour take-it-or-leave-it proposal considered by the Second Circuit in Paolillo v. Dresser Industries, 821 F.2d 81 (2nd Cir.1987). Appellant Bodnar, for instance, had ample time to and did consult with a lawyer and examine his option. We would be inclined to scrutinize closely any plan that was offered to employees on a

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[3]Synpol urges this court to disregard affidavits submitted by Appellants in opposition to the summary judgment motion on the grounds that they do not recite that they were made with personal knowledge, contain hearsay, allegations, ultimate facts and conclusions of law, and contradict sworn deposition testimony. Because, even considering the affidavits, Appellants do not allege facts sufficient to establish their claim of involuntariness, we need not address these issues.

shorter schedule, but one must concurrently recognize that a struggling business often has to take rapid and decisive action to stem losses.

That risk inhered in eligible employees' failure to accept the SERIP bonus offer, the risk that their jobs might be eliminated because of economic pressure on the company, is likewise insufficient to suggest age discrimination. The element of risk distinguishes this case somewhat from the no-lose early retirement plan characterized in Henn, 819 F.2d 824, but Appellants' risk, if they stayed on, would be shared by all remaining employees of Synpol. Compare Vaughn v. Pool Offshore, supra. It is thus fair here, as in Henn, to say that the SERIP afforded Appellants a means to mitigate that risk which was not available to other employees.

The appellants' vague and subjective impressions of threats conveyed by their supervisors when discussing the SERIP plan are too insubstantial a reed, in the absence of objective factors or actions suggesting age discrimination, on which to found a jury issue. See Henn, 819 F.2d at 829-30. This conclusion is particularly true in the context of a constructive discharge claim, which relies on an objective test to evaluate what otherwise appears to be voluntary conduct by an employee.

Because we do not find evidence in the record sufficient to create a jury issue on whether Appellants were constructively discharged in violation of the ADEA, we AFFIRM the trial court's judgment.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 86-2966

STEPHEN J. BODNAR,
Plaintiff-Appellant,

versus

SYNPOL, INC.,
Defendant-Appellee.

****

J. E. BLANKENSHIP and
B. E. WELCH,
Plaintiffs-Appellants,

versus

SYNPOL, INC.,
Defendant-Appellee.

Appeal from the
United States District Court for the
Eastern District of Texas

ON PETITION FOR REHEARING
(May 26, 1988)

Before GARWOOD and JONES, Circuit Judges and HITTNER*, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

ENTERED FOR THE COURT:

/s/ Edith H. Jones 5/23/88
United States Circuit Judge

* District Judge of the Southern District of Texas, sitting by designation.

Supreme Court, U.S.
FILED
SEP 29
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-329

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

STEPHEN J. BODNAR,
J. E. BLANKENSHIP AND B. E. WELCH,
Petitioners

v.

SYNPOL, INC.,
Respondent

SYNPOL INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

T. J. WRAY
1301 McKinney Street
Houston, Texas 77010
(713) 651-5151
Counsel of Record
for Respondent

OF COUNSEL:
STEPHEN W. SMITH
FULBRIGHT & JAWORSKI

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QUESTION PRESENTED

Whether the court of appeals properly held that employees who accepted early retirement in exchange for up to $20,000 in special incentive payments were not constructively discharged in violation of the Age Discrimination in Employment Act?

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No. 88-329

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

STEPHEN J. BODNAR,
J. E. BLANKENSHIP AND B. E. WELCH,
Petitioners

v.

SYNPOL, INC.,
Respondent

SYNPOL INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

This is an age discrimination suit challenging a special early retirement incentive program which the Petitioners accepted in the fall of 1983. As presented to the district court on motion for summary judgment, two issues were to be decided: (1) whether the Petitioners were constructively discharged when they agreed to early retirement in exchange for a cash incentive bonus of up to $20,000; and (2) whether the Petitioners' ADEA claims were barred by the releases they signed upon accepting early retirement. The district court granted summary judgment on grounds that the releases were

valid, and did not reach the constructive discharge issue. 633 F.Supp. 13.

The Fifth Circuit affirmed on grounds that the undisputed facts were insufficient to establish constructive discharge. 843 F.2d 190. In view of that holding, the court found it unnecessary to rule on the release issue. 843 F.2d at 192, n. 1.

REASONS FOR DENYING THE WRIT

I. *There Is No Conflict Among the Circuits Regarding Early Retirement Incentive Programs.*

The Fifth Circuit's ruling on the constructive discharge issue was a straightforward application of existing precedent. In the Fifth Circuit, as well as other circuits, the test for constructive discharge is whether working conditions were so intolerable that a reasonable person in the plaintiff's position would be compelled to resign. *Bourque v. Powell Electrical Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980); *Young v. Southwestern Savings and Loan Ass'n*, 509 F.2d 140, 144 (5th Cir. 1975).

Nothing in the court's opinion remotely suggests any conflict with the holding of another circuit court. The opinion does not hinge upon a novel theory of law or depart from well-established legal precedent. To the contrary, the decision is heavily fact-dependent; the court carefully considered (and rejected) each of the factual circumstances which the Petitioners claimed to be evidence of coercion.

Petitioners assert that the Fifth Circuit's decision contradicts a recent decision of the Second Circuit concerning the appropriate length of time given an employee to decide whether to accept early retirement. In *Paolillo v. Dresser Industries, Inc.*, 821 F.2d 81 (2d Cir. 1987), the Second Circuit overturned a summary judgment for an employer

who had given the plaintiffs no more than a weekend to make an informed decision about early retirement. Given the apparent complexity of the decision, the *Paolillo* court held that the shortness of time "certainly raise[s] a material issue as to whether appellants were given sufficient time to make a considered choice." 821 F.2d at 84. However, the Second Circuit made clear that it was not adopting a fixed rule regarding the amount of decision time necessary to render a decision voluntary:

> Because of the magnitude of the decision to accept early retirement, employees must be given a reasonable amount of time to reflect and to weigh their options in order to make a considered choice. *The amount of time reasonably required, though, will vary depending on the circumstances of each case.*

821 F.2d at 84 (emphasis supplied).

The Fifth Circuit was aware of the *Paolillo* decision at the time it ruled, and found it easily distinguishable on the facts:

> The fifteen-day time period, although not generous, is a far cry from the twenty-four hour take-it-or-leave-it proposal considered by the Second Circuit in *Paolillo v. Dresser Industries*, 821 F.2d 81 (2d Cir. 1987). Appellant Bodnar, for instance, had ample time to and did consult with a lawyer and examine his options. We would be inclined to scrutinize closely any plan that was offered on a shorter schedule, but one must concurrently recognize that a struggling business often has to take rapid and decisive action to stem losses.

843 F.2d at 193-94.

Thus, although the result was different, the standard applied by the Fifth Circuit was precisely the same as that applied by the Second Circuit — whether, under all the circumstances, the employees had a reasonable period of time to make an informed decision. The asserted conflict between the circuits on this issue is non-existent.

The Petitioners also assert that there is an apparent conflict among the circuits in their "feelings" toward early retirement incentive programs, contrasting the favorable attitude towards such plans reflected by Judge Easterbrook of the Seventh Circuit in *Henn v. National Geographic Society* 819 F.2d 824 (7th Cir. 1987), *cert. denied,* ____ U.S. ____, 108 S.Ct. 454 (1987), with the somewhat less enthusiastic attitude of Judge Feinberg in *Paolillo.* Again, this conflict is more apparent than real. No circuit has held that an early retirement incentive program, in and of itself, creates an inference of unlawful age discrimination.

To the contrary, almost every circuit has approved such plans in principle as a fair and humane corporate practice. *Henn v. National Geographic Society,* 819 F.2d 824 (7th Cir. 1987), *cert. denied,* ____ U.S. ____, 108 S.Ct. 454 (1987); *Gray v. New England Telephone and Telegraph Co.,* 792 F.2d 251, 255 (1st Cir. 1986); *Coburn v. Pan American World Airways, Inc.,* 711 F.2d 339, 344 (D.C. Cir. 1983), *cert. denied,* 464 U.S. 994 (1983); *Ackerman v. Diamond Shamrock Corp.,* 670 F.2d 66, 69 (6th Cir. 1982); *Sutton v. Atlantic Richfield Co.,* 646 F.2d 407, 410 n. 4 (9th Cir. 1981). The following passage from the District of Columbia Circuit opinion in *Coburn v. Pan American World Airways* is fairly representative:

> Coburn finds suspicious Pan Am's attempt to induce managers aged 55-65 to retire early. Early retirement is a common corporate practice utilized to prevent individual hardship. It is a humane practice well accepted by both employers and employees, and is purely voluntary. The evidence showed that Pan Am was justified in attempting to reduce its costs, and voluntary retirement was clearly a fair attempt to do so. It supports not a hint of age discrimination.

711 F.2d at 344.

Thus, the decision of the Fifth Circuit in this case is very much in harmony with those of other circuits in the treatment given to these early retirement incentive programs.

CONCLUSION

There is no conflict among the circuits regarding the standards by which early retirement incentive programs are measured under the ADEA. Nor is there a fixed rule governing the minimum amount of time an employee must be given to respond to an early retirement offer. The test is one of reasonableness under all the circumstances, a very fact-specific inquiry which the Fifth Circuit properly performed.

Therefore, this case simply does not fall into any category of cases which this Court has traditionally deemed worthy of review by writ of certiorari. The Petitioners' application for writ of certiorari should accordingly be denied.

Respectfully submitted,

T. J. WRAY
1301 McKinney Street
Houston, Texas 77010
(713) 651-5151
Counsel of Record for
Respondent Synpol, Inc.

OF COUNSEL:
STEPHEN W. SMITH
FULBRIGHT & JAWORSKI

CERTIFICATE OF SERVICE

I, T. J. Wray, counsel of record for Respondent Synpol, Inc., do hereby certify that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served upon counsel of record for Petitioners, Mr. H. P. Wright, Wright & Pitre, Post Office Box 186, Port Neches, Texas, 77651, on this the 29th day of September, 1988, by United States certified mail, return receipt requested, postage prepaid.

T. J. WRAY